

DOCKETED

NOV - 2 2016

R. POSTELL
COMMERCE PROGRAM

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

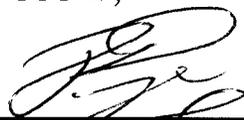
<p>S&L REAL ESTATE</p> <p style="text-align: center;"><i>Plaintiff</i></p> <p style="text-align: center;">v.</p> <p>FRANKFORD RESTAURANT HOLDINGS, INC., THOMAS UPDEGROVE, and SARAH BROWN</p> <p style="text-align: center;"><i>Defendants</i></p>	<p>:</p>	<p>August Term, 2016</p> <p>Case No. 04547</p> <p>Commerce Program</p> <p>Control No. 16100072</p>
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ORDER

AND NOW, this 2nd day of November, 2016, upon consideration of the petition to strike or open judgment by confession, the response in opposition, and the respective *memoranda* of law, it is **ORDERED** as follows:

- I. The petition to strike is **GRANTED-IN-PART** and **DENIED-IN-PART**, and the confession of judgment is **STRICKEN** only as to defendant Frankford Restaurant Holdings, Inc. The remainder of the petition to strike, which asks the court to strike judgment by confession in its entirety, is **DENIED**.
- II. The petition to open confession of judgment is **GRANTED**.

BY THE COURT,



RAMY I DJERASSI, J.



MEMORANDUM OPINION

This action in confession of judgment arises out of a Lease Agreement (the “Lease”), entered into by plaintiff S&L Real Estate (“Plaintiff”) and defendants Frankford Restaurant Holdings (“FRH”), Thomas Updegrove (“Updegrove”) and Sarah Brown (“Brown”), dated November 25, 2013.¹ Whenever required, FRH, Updegrove and Brown shall be collectively identified as “Defendants.”

On September 2, 2016, Plaintiff filed the instant complaint-in-confession-of-judgment against Defendants (the “Complaint”). The Complaint alleges that Defendants are in default of the terms of the Lease for monetary and non-monetary breaches. Specifically, the Complaint alleges *inter alia* that Defendants have “repeatedly failed to pay base monthly rent and additional rent on a timely basis ... [and] remain in violation of the Lease and [have] failed to cure the alterations made to the premises in violation of the Lease”² The Complaint provides an itemization of damages as follows:

Damages—Breach of the Lease (Count I)

Base Rent and Charges 8/1/2016—9/1/2016	\$5,306.00
Attorney Fees	\$5,000.00
Repair Fees arising out of unauthorized alterations	\$25,000.00

Accelerated Rent (Count II)

Last 4 months of 2016 (3 rd year)	\$10,612.00
Full 4 th year	\$32,472.00
Full 5 th year	\$33,122.17

On October 3, 2016, Defendants filed the instant petition to strike or open the confession of judgment. Plaintiff timely filed its answer and *memorandum* in opposition.

¹ Lease, Exhibit A to the complaint-in-confession-of-judgment.

² Complaint, ¶ 11(a), ¶ 11(b).

PETITION TO STRIKE

The law on striking confessions of judgment is well—settled:

[a] petition to strike a judgment is a common law proceeding which operates as a demurrer to the record. A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record....

In other words, the petition to strike a confessed judgment must focus on any defects or irregularities appearing on the face of the record, as filed by the party in whose favor the warrant was given, which affect the validity of the judgment and entitle the petitioner to relief as a matter of law.³

Moreover, the complaint-in-confession-of-judgment shall contain “**the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature....**”⁴

Finally—

[a] warrant of attorney to confess judgment must be self-sustaining and to be self-sustaining the warrant must be in writing and signed by the person to be bound by it. **The requisite signature must bear a direct relation to the warrant of attorney and may not be implied.**⁵

In the petition to strike, Defendants assert *inter alia* that the judgment should be stricken because the Lease “does not include ... all of the [Defendants’] signatures.”⁶

Opposing the petition to strike, Plaintiff admits that corporate Defendant FRH did not affix its signature upon the Lease; nevertheless, Plaintiff argues that although the signature space reserved to corporate Defendant FRH is blank, “it is evident that, as officers of the corporation [FRH], the individual Defendants had the authority to

³ Neducsin v. Caplan, 121 A.3d 498, 504 (Pa. Super. 2015), appeal denied, 131 A.3d 492 (Pa. 2016).

⁴ Pa. R.C.P. No. 2952(a)(2) (2016) (emphasis supplied).

⁵ L. B. Foster Co. v. Tri-W Const. Co., 186 A.2d 18, 20 (Pa. 1962) (emphasis supplied).

⁶ Petition to strike, ¶ 15; *id.*, ¶¶ 16—17. The court examined the signature page on the Lease and found that individual Defendants Updegrave and Brown had indeed executed the instrument individually, but corporate Defendant FRH had not. Lease, Exhibit A to the Complaint.

execute the Lease on behalf of the corporation.”⁷ This argument is rejected because “[t]he requisite signature [in a contract] must bear a direct relation to the warrant of attorney and may not be implied.”⁸ In this case, the court may not imply that FRH was bound to the Lease merely because its officers, Updegrove and Brown, signed the spaces specifically designated for them in their individual capacity.⁹

The argument of Plaintiff is also rejected on other grounds. In support of its argument, Plaintiff relies on three Pennsylvania cases dating back respectively to 1895, 1940, and 1953.¹⁰ Specifically, Plaintiff relies on such cases to assert that in confession-of-judgment proceedings, “the prothonotary may ... enter judgment [not only] against the ... persons who executed the [instrument],” but may also “look beyond” the instrument and enter judgment against Defendant FRH “whose agents,” namely individual Defendants Updegrove and Brown, “have signed” the instrument on behalf of FRH.¹¹ The court holds that reliance on the three decisions cited above is inappropriate because subsequent to the release of such decisions, the Pennsylvania Supreme Court adopted Pa. R.C.P. 2959(a)(2). This Rule trumps the holdings in the prior three cases by specifically requiring that a judgment by confession “shall contain the original or a photostatic copy or like reproduction of the instrument **showing the defendant's signature.**”¹²

⁷ *Memorandum of law of Plaintiff in opposition to the petition to strike*, at ¶ II—Argument.

⁸ *L. B. Foster Co. v. Tri-W Const. Co.*, 186 A.2d 18, 20 (Pa. 1962).

⁹ Lease, Signature page, Exhibit A to the Complaint, p. 4 of 5.

¹⁰ *Miller v. Royal Flint Glass Works*, 33 A. 350 (Pa. 1895), *Jamestown Banking Co. v. Conneaut Lake Dock & Dredge Co.*, 14 A.2d 325 (Pa. 1940), *Toll v. Pioneer Sample Book*, 94 A.2d 764 (Pa. 1953).

¹¹ *Memorandum of law of Plaintiff in opposition to the petition to strike* at ¶ II—Argument.

¹² Pa. R.C.P. 2959(a)(2) (adopted June 27, 1969) (emphasis supplied). See also Pa. R.C.P. 51: “[t]hese rules shall be known as the Pennsylvania Rules of Civil Procedure...”; Pa. R.C.P. 51 Explanatory Comment—1979: “The rule-making power of the Supreme Court is constitutionally derived from Article V, Section 10(c) of the Constitution of 1968.... [T]he Judicial Code delegates to the Supreme Court rule-making power in substantive areas not traditionally within the scope of practice and procedure.” For

The analysis however may not end here because Defendants did not specifically asks this court to strike judgment by confession only as to Defendant FRH. Instead, the petition and attached proposed order appear to argue that the judgment should be stricken not only as to corporate Defendant FRH, but also as to individual Defendants Updegrave and Brown. To the extent Defendants seek this outcome, the court rejects the argument. The court rejects the argument because individual Defendants Updegrave and Brown did affix their signatures on the Lease in their individual capacity, and as such they are bound to terms of that contract. Stated another way, the signatures of Defendants Updegrave and Brown, while failing to bear a direct relation to the warrant-of-attorney as applied to corporate Defendant FRH, do bear a direct relation to their own obligations under the warrant and Lease. For this reason, the petition to strike is granted as to corporate defendant FRH, and the Complaint-in-confession-of-judgment is stricken only as to that Defendant. Otherwise, the petition to strike is denied as to individual Defendants Updegrave and Brown.

PETITION TO OPEN

The law on opening judgment by confessions is also well—settled:

The trial court may open a confessed judgment if the petitioner

- (1) acts promptly,
- (2) alleges a meritorious defense, and
- (3) can produce sufficient evidence to require submission of the case to a jury.¹³

A meritorious defense is one upon which relief could be afforded if proven at trial.¹⁴

these reasons, the adoption of Pa. R.C.P. 2959(a)(2), moots the argument that the prothonotary may look beyond the instrument and enter judgment against a party that did not affix its signature thereon.

¹³ Neducsin v. Caplan, 121 A.3d 498, 506 (Pa. Super. 2015), appeal denied, 131 A.3d 492 (Pa. 2016).

¹⁴ Id.

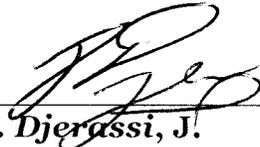
If evidence is produced which in a jury trial would require the issues to be submitted to the jury the court shall open the judgment. Furthermore, the court must view the evidence presented in the light most favorable to the moving party, while rejecting contrary evidence of the non-moving party.¹⁵

In the petition to open the confession of judgment, Defendants contest as speculative the amount of attorney fees claimed by Plaintiff, as well as the amount of \$25,000.00 claimed as “Repair Fees.”¹⁶ Based on the foregoing, this court examined the record, including the amount claimed by Plaintiff in Table 1, supra, and determined that—

1. Plaintiff does claim \$25,000.00 as Repair Fees. However—
2. Plaintiff readily concedes that the amount claimed as Repair Fees may present “irregularities” because Plaintiff has not yet regained possession of the leased premises, and could not have formed an accurate assessment of the amount necessary to repair the property.¹⁷

Based on the foregoing, the Court can only conclude that the claimed amount of \$25,000.00 in Repair Fees, and the attorney fees calculated therefrom, are speculative. Since the actual amount in Repair Fees, if any, can be determined only by settlement or at the conclusion of repairs, the petition to open the judgment is granted.¹⁸

By The Court,



Ramy I. Djerassi, J.

¹⁵ Id.

¹⁶ Petition to open, ¶¶ 25–34. The Warrant-of-Attorney provision within the Lease contemplates recoverable attorney’s fees of 15% of rents and other charges and costs.

¹⁷ Response in opposition to the petition to open, ¶¶ 25–34. Even if the court could accept \$25,000.00 as a proper amount in Repair Fees, the attorney fees claimed by Plaintiff appear to exceed the limits of 15% contained in the warrant-of-attorney. A quick calculation shows as follows: \$5,306.00 (Base Rent) + \$25,000.00 (Repair Fees) = \$30,306.00. Fifteen percent of \$30,306.00 = \$4,545.90. In this case, however, Plaintiff claims \$5,000.00 or \$455.90 in excess of 15%.

¹⁸ The court directs the parties’ attention to Pa. R.C.P. 2960: “[i]f a judgment is opened in whole or in part the issues shall be defined by the complaint ... and by the petition, answer and the order of the court opening the judgment. There shall be no further pleadings.”